



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Coram: D. K. Kemei - J**

**CIVIL APPEAL NO. 87 OF 2018**

**KYAMU CONSTRUCTION & ENGINEERING LIMITED.....APPELLANT**

**VERSUS**

**ASSOCIATED CONSTRUCTION CO LTD.....RESPONDENT**

*(Being an Appeal from the ruling of Hon C.C. Oluoch, (Senior Principal Magistrate)*

*in Mavoko SPMCC 205 of 2016 delivered on the 4.7.2018)*

**BETWEEN**

**KYAMU CONSTRUCTION & ENGINEERING LTD.....PLAINTIFF**

**VERSUS**

**ASSOCIATED CONSTRUCTION CO LTD.....DEFENDANT**

**JUDGEMENT**

1. The background to the instant appeal is that the respondent filed an application in the trial court seeking inter alia stay of execution of the decree that had been issued in the trial court pending the hearing and determination of an application for leave to file an appeal in the high court. The trial court delivered its ruling on 4.7.2018 wherein it allowed the application and granted the respondent stay of execution of the decree pending delivery of the logbook to the appellant.

2. The appellant, dissatisfied with the said ruling filed a memorandum of appeal that raised the following grounds;

***a) That the learned trial magistrate erred in law and fact in failing to consider that the court became functus officio after delivery of judgement on 14.3.2018.***

***b) That the learned trial magistrate erred in law and fact in failing to consider that the respondent was in violation of court orders having failed to deliver the log book to the applicant within 30 days from the date of the judgement.***

***c) That the learned trial magistrate erred in law and fact in failing to consider that the respondent had received a notice of delivery of judgement through a letter dated 16.3.2018.***

***d) That the learned trial magistrate erred in law and fact in failing to consider the fact that the ruling dated 4.7.2018 amounts to a review of the court's own judgement.***

***e) That the learned trial magistrate erred in law and fact in failing to consider the fact that the respondent did not file any application for extension of time to deliver the logbook.***

***f) That the learned trial magistrate erred in law and fact in failing to consider the fact that the said ruling may encourage future disregard of court orders and implementation of justice.***

3. Counsel prayed that the appeal be allowed with costs and that the ruling of the Principal Magistrate dated 4.7.2018 be set aside and the appellant be allowed to proceed with the execution of the judgement dated 14.3.2018.

4. Directions were given that the parties file submissions. However, it is only the appellant's submissions that are on record. Learned counsel for the appellant vide submissions dated 18.3.2020 framed two issues for determination. Firstly, whether the Senior Principal Magistrate's court was functus officio upon delivering its judgement on 14.3.2018 and secondly, whether the Senior Principal Magistrate's court had jurisdiction to entertain the Respondent's application dated 25.4.2018 resulting in the ruling of 4.7.2018.

5. In respect of the 1<sup>st</sup> issue, counsel in placing reliance on the case of **Telkom Kenya Ltd v John Ochanda (2014) eKLR** submitted that the trial court became functus officio when it delivered its judgement on 14.3.2018. It was pointed out that the respondent did not file any application for extension to comply with the court orders issued on 14.3.2018 hence their application for stay outside the 30 days period set by the court was in bad faith.

6. In respect of the 2<sup>nd</sup> issue, it was submitted that once the trial court delivered its judgement on 14.3.2018 it lacked jurisdiction to entertain the application that resulted in the orders issued on 14.7.2018. It was therefore the argument of counsel that the orders issued on 4.7.2018 were a deviation from the orders of 14.3.2018 and this could only be done by a higher court.

7. Having considered the appeal and the submissions of counsel, the issue for determination is whether the appeal has merit.

8. The appellant challenges the order that was issued on 4.7.2018 yet the court was already functus officio and further that the same was a departure from the judgement that was issued on 14.3.2018. It would appear that the trial court exercised powers to review its judgement and yet there was no application and or grounds for the same.

9. I have looked at the application that is the subject of the said ruling and the same seeks two main prayers. Firstly, stay of execution pending an application for leave to file an appeal in the high court and Secondly, an order that the respondent hand over the logbook that is in its possession in settlement of the case. The ruling was rendered in which the application was allowed as prayed.

10. I note that the court had rendered a judgement that was in similar terms and was to the effect that the respondent was to handover the logbook to the suit vehicle to the appellant within 30 days of the judgement that was delivered on 14.3.2018 or refund the sum of Kshs 6.5m/- and that if he defaulted the appellant was in turn to hand over a vehicle to the respondent. It appears that within the stipulated 30 days, the respondent failed to handover the logbook and equally failed to refund the decretal sum and thereafter the respondent was jolted by proclamations and warrants dated 18.4.2018 that led to the impugned application.

11. It is trite law that a court order once issued ought to be obeyed and that the same remains in force unless appealed against. I find it rather mischievous for the respondent to fail to comply with the court orders then file another application seeking a remedy in similar terms as that in which the court had pronounced itself and rendered its judgement.

12. **Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR**, the Learned Justices of the Court of Appeal stated:

*“We think that we have the jurisdiction to stop it in its tracks in order to attain or further the “O2” principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court.”*

13. If indeed the Respondent was candid, there was nothing that stopped it from recording a consent or seeking extension of time within which to comply with the judgement of the court. It was therefore erroneous for the trial court to render itself on a matter that it had already pronounced itself. *A priori*, the court was *functus officio* and had no jurisdiction to peg the grant of stay on the handover of the logbook. And again, the appellant has pointed out in their submissions that the appeal that the respondent seemed to hinge its application for stay was withdrawn on 17.12.2019 on the grounds that the respondent was no longer interested in prosecuting the appeal. It would appear that it was no longer convenient for the respondent to have the said appeal alive yet it had vide the ruling that was delivered on 4.7.2018 already achieved its aim of circumventing the judgement of the court that was rendered on 14.3.2018.

14. It goes without saying that the respondent vide the application dated 25.4.2018 was misusing court process to avoid execution and this court has inherent power to preserve the integrity of the judicial process. See the case of **Chairman, Cooperative Tribunal & 8 Others Ex Parte Management Committee Konza Ranch & Farming Cooperative Society Limited (2014) eKLR**.

15. In the premises, I find merit in the appeal and consequently set aside the ruling of the Principal Magistrate dated 4.7.2018. The appellant shall have the costs of the appeal.

It is so ordered.

**Dated and delivered at Machakos this 1<sup>st</sup> day of December, 2020.**

**D. K. Kemei**

**Judge**